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The Painting Contractor, LLC and International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6. Cases 09-CA-248716 and 09-CA-250898

February 2, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING
AND PROUTY

On February 26, 2021, Administrative Law Judge Geoffrey Carter issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed a combined answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ only to the extent consistent with this Decision and Order.²

The principal issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to adhere to the successor collective-bargaining agreement reached on May 28, 2019, between the International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6 (Union) and the Greater Cincinnati Painting Contractors Association (Association). The judge dismissed this allegation, finding that the Respondent timely and unequivocally withdrew from the Association before the successor agreement was reached. The judge then considered the General Counsel's alternative allegation that, even if not bound to the successor agreement, the Respondent nonetheless violated Section 8(a)(5) and (1) by unlawfully implementing the terms of its final contract proposal in November 2019. Finding that the Respondent and Union

had reached a good-faith impasse in bargaining, the judge dismissed that allegation.³

For the reasons discussed below, we find, contrary to the judge, that the Respondent's attempted withdrawal from the Association was not timely and that it therefore violated Section 8(a)(5) and (1) by refusing to adhere to the successor collective-bargaining agreement. As a result, we find it unnecessary to pass on the General Counsel's alternative allegation.

BACKGROUND

For many years, the Respondent had been a member of the Association, a multiemployer bargaining group consisting of approximately eight painting and drywall companies. The Association has been party to a series of collective-bargaining agreements with the Union, including an agreement effective by its terms from May 1, 2016, to May 1, 2019 (the "Agreement"). In relevant part, Article 19 of the Agreement stated:

These Articles of Agreement shall be and are in full force and effect May 1, 2016 to/and including May 1, 2019, and from year to year thereafter unless either party notifies the other in writing at least 90 days prior to the date of expiration that a change in terms is requested. Any contractor that decides to withdraw from [the Association] and negotiate separately, may only do so at the expiration of this Agreement, provided such contractor provides written notice of withdrawal to the Union and the Association not more than 120 days before and not less than 90 days prior to the expiration date of this Agreement or by written notice to the Union and the Association at least 3 days before any extension of this Agreement is executed by the Association.

On January 28, 2019,⁴ the Union timely notified the Association that it wished to modify or extend the Agreement upon its expiration. On February 11, the Union and the Association began negotiations for a successor agreement. On April 23, the parties reached a tentative agreement, and they extended the Agreement through May 14. As required by the constitution of the International Union, the Union presented the tentative agreement to the bargaining unit employees for a ratification vote,⁵ and the unit rejected it. On May 14, the Union

¹ No party excepts to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by telling employees that they would have to work for a different employer in order to keep their current benefits.

² We shall modify the judge's recommended Order to conform to our findings, amend the conclusions of law and remedy, and substitute a new notice to conform to the Order as modified.

³ There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the amount of its contributions to two employee benefit funds in June 2019.

⁴ All further dates are in 2019 unless otherwise noted.

⁵ We take administrative notice that Sec. 233(b) of the Constitution of the International Union of Painters and Allied Trades provides that "[a]ll collective bargaining agreements negotiated by a District Councils [sic] or an unaffiliated Local Union shall be subject to ratification through a referendum vote of the members working under the agreement."

and the Association reached a second tentative agreement and extended the Agreement through May 23, and the Union agreed to cancel a planned strike.

On May 17, the Respondent's attorney emailed the Association and the Union a notice stating, in relevant part:

Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is [Respondent's] notice of withdrawal from the Association, contemporaneous with such extension. [Respondent] would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires.

On May 23, the bargaining unit rejected the second tentative agreement and went on strike effective May 24. The unit employees remained on strike May 25 and 26, and May 27 was a holiday. On May 28, the Union and the Association met for further negotiations and reached a third tentative agreement. The Respondent's representative attended the negotiations and voted against the third tentative agreement, but a majority of the Association members voted to approve it. After reaching agreement on the third tentative agreement, the Association and Union agreed to extend the Agreement through June 5, and the Union ended the strike.

Later on May 28, the Respondent's attorney emailed the Association and the Union, stating that pursuant to its May 17 notice, the Respondent was no longer a member of the Association, its withdrawal having become effective upon the extension of the Agreement earlier that day. The email also stated that no successor agreement that "would be effective after expiration of the current extension" would apply to the Respondent, but that it understood the Agreement remained in effect for its employees until the extension expired. The Respondent proposed May 30 to the Union as a date to begin separate contract negotiations.

On May 29, the Union responded that it believed the Respondent was bound to the third tentative agreement reached between the Association and the Union. Replying the next day, May 30, the Respondent reiterated its position that it was not bound, stating: "[O]n May 28, 2019, by operation of Article XIX and [Respondent's] Article XIX notice, [Respondent] separated from the Association, and is not bound by any alleged Tentative Agreement or any other agreements between the Association and Union that would be in effect after June 5." At the hearing, the parties stipulated that the Respondent's May 30 email clarified that "withdrawal did not occur until the Association and the Union executed the third extension" on May 28.

On June 5, the bargaining unit ratified the third tentative agreement. Thereafter, the Association and Union

implemented the successor agreement. Consistent with the successor agreement and past practice, the Union allocated a \$0.69 wage increase for the first year of the contract to pension and health and welfare benefits.

ANALYSIS

Where an employer is contractually bound to a multiemployer bargaining-agency relationship, withdrawal from that relationship is not "free and uninhibited" but must be timely and unequivocal. *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958). Withdrawal is permitted "upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." *Id.* at 395. Once negotiations have commenced, however, withdrawal is not permitted absent mutual consent or other unusual circumstances. *Id.* In addition to fostering stability in multiemployer bargaining relationships, these longstanding rules prevent employers from seeking to gain leverage by withdrawing from multiemployer bargaining "'in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed' by the [u]nion's proposals." *Carvel Co.*, 226 NLRB 111, 112 (1976) (quoting *Mor Paskesz*, 171 NLRB 116, 118 (1968), *enfd.* 405 F.2d 1201 (2d Cir. 1969)), *enfd.* 560 F.2d 1030 (1st Cir. 1977), *cert. denied* 434 U.S. 1065 (1978).

In the instant case, negotiations for a successor agreement commenced on February 11. Accordingly, the Respondent could not withdraw from multiemployer bargaining after that date absent mutual consent or other unusual circumstances. *Retail Associates, Inc.*, 120 NLRB at 393. The Respondent contends that such mutual consent is established here by the language of Article 19 of the Agreement permitting withdrawal from the Association upon "written notice . . . at least 3 days before any extension of this Agreement is executed by the Association." We need not decide, however, whether the Respondent's contention regarding Article 19 is correct. As explained below, the Respondent failed to exercise in a timely manner any right to withdraw from multiemployer bargaining that Article 19 may have conferred.

By its terms, the Respondent's May 17 notice provided that the Respondent would withdraw from the Association "if there is a further extension of the Agreement," and it specified that withdrawal would be effective "contemporaneous with such extension." In addition, the parties stipulated at the hearing that the Respondent's May 30 email clarified that "withdrawal did not occur until the Association and the Union executed the third extension." On May 28, the Association and Union agreed to "a further extension of the Agreement" *after* they reached tentative agreement on a successor collec-

tive-bargaining agreement. Based on the event the Respondent itself chose for its withdrawal to become effective, it was still a member of the Association when that agreement was reached and therefore was bound by it.⁶

The Respondent contends that it permissibly withdrew after the Association and Union had reached the third tentative agreement because ratification was a condition precedent to contract formation, and the bargaining unit did not ratify the third tentative agreement until June 5. The contention is unavailing. Ratification by the unit employees was neither a condition explicitly agreed to by the Association and Union nor an express term of the third tentative agreement. Rather, it was mandated by the constitution of the International Union. “When a union, as here, limits its own authority to enter into a binding agreement . . . by imposing on itself the requirement that its membership ratify the agreement, that requirement does not constitute a condition precedent.” *Williamhouse-Regency of Delaware*, 297 NLRB 199, 199 fn. 5 (1989) (citing *Sacramento Union*, 296 NLRB 477 (1989)), *enfd.* 915 F.2d 631 (11th Cir. 1990). Instead, it signifies only that “rights and duties under any agreement reached would not become effective until ratified by the employees.” *Tri-Produce Co.*, 300 NLRB 974, 974 fn. 2 (1990). Thus, despite the “tentative agreement” terminology used by the Association and Union, a contract binding on the Association’s member employers was formed on May 28 *before* the Association and Union extended the Agreement, and the Respondent’s May 17 notice made withdrawal effective “contemporaneous with such extension.”⁷ Accordingly, the Re-

spondent was bound to the successor agreement reached by the Association and Union on May 28, and it violated Section 8(a)(5) and (1) of the Act by failing to adhere to that agreement.⁸

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and its constituent Locals No. 123 and 238 are labor organizations within the meaning of Section 2(5) of the Act.

3. By, on or about June 16, 2019, unilaterally changing contributions to the Target Fund and the Drug Free Workplace program before bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By failing to adhere to the terms of the successor agreement reached by the Association and Union on May 28, 2019, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices stated in conclusions of law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we amend the judge’s remedy in the following respects.

We shall order the Respondent to honor and adhere to the terms of the May 28, 2019, successor collective-bargaining agreement, including by rescinding any changes made since that date that are inconsistent with the terms and conditions of employment contained in the successor agreement. We shall also order the Respondent to make whole its unit employees for any loss of earnings and other benefits resulting from the Respondent’s failure and refusal to adhere to the successor agreement in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In

⁶ We disagree with the judge’s finding that the May 17 notice of withdrawal was effective on May 21 on the basis that the Association and Union did not execute an extension of the Agreement during the three days following the May 17 notice. That interpretation is contrary to the plain terms of the notice for the reasons explained above. The judge’s interpretation is also contrary to the Respondent’s May 30 email, discussed above, and the parties’ related stipulation that the May 30 email clarified that “withdrawal did not occur until the Association and the Union executed the third extension” on May 28. “[I]t is generally accepted that a stipulation is conclusive on the party making it and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it.” *Kroger Co.*, 211 NLRB 363, 364 (1974) (footnote citation omitted). Accordingly, in light of the parties’ stipulation and the express terms of the May 17 notice, we find, contrary to the judge, that the Respondent’s notice of withdrawal was not effective until the Agreement was extended on May 28. In light of this finding, we need not address the judge’s determination that Article 19 of the Agreement permitted withdrawal on May 21 or the General Counsel’s and Charging Party’s exceptions thereto.

⁷ Contrary to the Respondent, the Union’s wage-allocation determination following the unit employees’ June 5 ratification does not affect the analysis. That determination was made by the Union pursuant to its own internal process, which it carries out annually, of allocating already agreed-upon wage increases to hourly wages or fringe benefits. Thus, the Union’s allocation decision after the successor agreement was

ratified had no effect on whether the Association and Union reached agreement on a successor agreement on May 28.

⁸ Member Prouty notes that in his view the conditional nature of Respondent’s May 17 notice, which qualified the Respondent’s intention to withdraw on the occurrence of an uncertain future event in bargaining, demonstrates that the notice was “equivocal,” and ineffective for this reason as well. See *Retail Associates, Inc.*, *supra* at 393 (“Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time.”).

the event backpay is owed, we shall order the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Regional Director for Region 9 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In addition to the backpay-allocation report, we shall order the Respondent to file with the Regional Director for Region 9 a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award. *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Additionally, we shall order the Respondent to remit all payments it owes to employee benefit funds, if any, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁹ Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, *supra*, with interest at the rate prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.¹⁰

ORDER

The National Labor Relations Board orders that the Respondent, The Painting Contractor, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6 (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit by refusing to adhere to the successor collective-bargaining agreement entered into by and between the Union and the Greater Cincinnati Painting

Contractors Association (Association) at a time when the Respondent was represented by the Association for purposes of collective bargaining with the Union.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by decreasing the amount of contributions to the Target Fund and ceasing to make contributions to the Drug Free Workplace program.

(c) In any like or related in manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the successor collective-bargaining agreement agreed to by the Association and Union on May 28, 2019, including by rescinding any unilateral changes inconsistent with the terms of the successor agreement.

(b) Make whole its unit employees for any loss of earnings and other benefits resulting from its failure to adhere to the successor agreement, including any losses resulting from failure to make benefit-fund contributions required under that agreement, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Make whole its unit employees for any loss of earnings and other benefits suffered as a result of its unlawful unilateral changes to its contributions to the Target Fund and the Drug Free Workplace program, make all benefit fund contributions it has unlawfully failed to make since May 28, 2019, and reimburse its unit employees for any expenses resulting from any failure to make benefit-fund contributions required under the successor agreement, all in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

(e) File with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

⁹ As noted above, there are no exceptions to the judge's finding that the Respondent unlawfully reduced contributions to one employee benefit fund (Target Fund) and ceased contributions to a second employee benefit fund (Drug Free Workplace program) beginning in June 2019. However, it appears those actions were consistent with the terms of the successor agreement we now find the Respondent must adhere to. We leave to compliance whether the Respondent must pay any amounts to the benefit funds to remedy the violation.

¹⁰ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Cincinnati, Ohio, a copy of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 2, 2022

¹¹ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lauren McFerran,

Chairman

John F. Ring,

Member

David M. Prouty,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain with the International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6 (Union) as the exclusive collective-bargaining representative of our bargaining unit employees by refusing to adhere to the successor collective-bargaining agreement entered into by and between the Union and the Greater Cincinnati Painting Contractors Association (Association) at a time when we were represented by the Association for purposes of collective bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment by decreasing the amount of contributions to the Target Fund and ceasing to make contributions the Drug Free Workplace program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL adhere to the successor collective-bargaining agreement agreed to by the Association and Union on May 28, 2019, including by rescinding any unilateral

changes inconsistent with the terms of the successor agreement.

WE WILL make whole our unit employees, with interest, for any loss of earnings and other benefits resulting from our failure to adhere to the successor agreement, including any losses resulting from our failure to make benefit-fund contributions required under that agreement.

WE WILL make whole our unit employees, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes to contributions to the Target Fund and the Drug Free Workplace program, WE WILL make all benefit fund contributions we unlawfully failed to make since May 28, 2019, and WE WILL reimburse our unit employees, with interest, for any expenses resulting from our failure to make any benefit-fund contributions required under the successor agreement.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

THE PAINTING CONTRACTOR, LLC

The Board's decision can be found at www.nlrb.gov/case/09-CA-248716 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Jamie Ireland, Esq., for the General Counsel.

Gary Greenberg and Alessandro Botta Blondet, Esqs., for the Respondent.

Marilyn Widman, Esq., for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that The Painting Contractor, LLC (Respondent) violated the National Labor Relations Act (the Act) by: failing and refusing to adhere to a collective-bargaining agreement that the International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6 (Union) negotiated with the Greater Cincinnati Painting Contractors Association (Association) in 2019; making various unilateral changes to the terms and conditions of employment without first bargaining with the Union to a good-faith impasse; and making a statement at an employee meeting that had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. For the reasons explained below, I have determined that Respondent violated the Act by failing to make contributions to two benefit funds from about June 16 through October 31, 2019, due to unlawful unilateral changes that Respondent made before reaching a good-faith impasse in bargaining with the Union. I have recommended that the remaining allegations in the complaint be dismissed.

STATEMENT OF THE CASE

This case was tried by videoconference on January 5–6, 2021. The Union filed the charge in Case 09–CA–248716 on September 23, 2019, and filed the charge in Case 09–CA–250898 on October 30, 2019.¹ On September 30, 2020, the General Counsel issued a consolidated complaint² in which it alleged that Respondent violated Section 8(a)(5) and (1) of the Act by: since about May 30, 2019, refusing to adhere to a collective-bargaining agreement that the Union negotiated with the Greater Cincinnati Painting Contractors Association (in which Respondent had been an employer-member);

(a) on about June 16, 2019, ceasing contributions to the Drug Free Workplace program and reducing contributions to the Target Fund;

(b) on about October 28, 2019, telling employees that they would need to work for a different employer if they wished to keep their current benefits under a union contract; and

(c) on about November 1, 2019, withdrawing from the Southern Ohio Painters Health and Welfare Fund, ceasing participation in the IUPAT Union and Industry National Pension Fund, and changing bargaining unit employee wage rates without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

On the entire record,³ including my observation of the de-

¹ All dates are in 2019 unless otherwise indicated.

² On December 16, 2020, the General Counsel amended the complaint to specify the names and job titles of four alleged supervisors and agents of Respondent.

³ The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 11, l. 23: “discriminates” should be “discriminatees”; p. 12, l. 2: “discriminate” should be “discriminatee”; p. 21, l. 1: “quote” should

meanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT⁴

I. JURISDICTION

Respondent, a limited liability company with an office and place of business in Cincinnati, Ohio, is a painting contractor in the construction industry and does commercial and industrial painting and wall covering. In the 12-month period ending on July 31, 2020, Respondent performed services valued in excess of \$50,000 in states other than the state of Ohio.

Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union and its constituent Locals No. 123 and No. 238 have been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent and the Greater Cincinnati Painting Contractors Association

As noted above, Respondent is a commercial and industrial painting contractor and “surface solution specialist” that provides services in the Greater Cincinnati area. (Jt. Exh. 36 (par. 1).)

For several years, Respondent was a member of the Greater Cincinnati Painting Contractors Association (Association), a group of approximately eight painting and drywall companies. Association members authorize the Association to negotiate on their behalf for collective bargaining. Each company in the Association generally has a representative present during contract negotiations, and different company representatives may speak on behalf of the Association at various times. (Jt. Exh. 36 (pars. 8–9).)

2. The Union and collective-bargaining history with the Association

The Union represents painters and drywall finishers that are members of Local 123 and Local 238. Members of the two

be “quo”; p. 31, ll. 20, 24: “advance” should be “abeyance”; p. 32, l. 24: “contritions” should be “contributions”; p. 33, l. 2: “quote” should be “quo”; p. 34, l. 19: “dry” should be “drug and”; p. 87, l. 9: “reduced” should be “dues”; p. 94, l. 16: “Hardy” should be “Varney”; p. 94, l. 22: “Barney” should be “Varney”; p. 95, l. 9: “82019” should be “2019”; p. 107, l. 13: “Barney” should be “Varney”; p. 114, l. 20: “agrees” should be “grieves”; p. 158, l. 13: “disposal” should be “disclosure”; and p. 169, l. 25: “Barney” should be “Varney”.

In addition, I hereby grant the parties’ February 10, 2021 joint request to admit Joint Exhibit 10A into the evidentiary record as a legible copy of Joint Exhibit 10 with the understanding that Joint Exhibit 10A omits the handwritten approval notation and signatures shown on Joint Exhibit 10.

⁴ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

Locals are employees of companies who are part of the Association. The Union represents a total of approximately 400 members, 35 of which were employees of Respondent in 2019 (through October 2019). (Jt. Exh. 36 (par. 7).)

The Union and members of the Association, including Respondent, have been parties to a series of collective-bargaining agreements, the most recent (undisputed) of which was effective from May 1, 2016, to May 1, 2019. (Jt. Exhs. 1, 36 (par. 9).)

B. January—May 2019: The Union and the Association Begin Negotiations for a New Collective-Bargaining Agreement

On January 28, 2019, the Union notified Respondent that it wished to modify and/or extend the collective-bargaining agreement. Consistent with that notice, the Union and the Association started negotiations for a new contract on about February 11, 2019. (Jt. Exhs. 20, 36 (par. 10) (noting that the Association and the Union met for contract negotiations approximately 10 times between February 11 and May 28, 2019).)

On April 23, 2019, the Union and Association reached a tentative agreement (TA 1) on modifications to the old collective-bargaining agreement. Among other terms, TA 1 included a proposed \$0.80 combined increase for pension and wages in the first contract year, followed by \$1.00 increases in years two and three of the contract. The same day, the Union and the Association agreed to extend the old collective-bargaining agreement to May 14, 2019, and planned to present TA 1 to the bargaining unit for a ratification vote (albeit without the endorsement of the Union’s negotiating team). The bargaining unit subsequently (on May 7) voted against ratifying TA 1. (Jt. Exhs. 21, 36 (pars. 11–12); Tr. 43–48, 131–133; see also Tr. 44, 48, 133 (noting that Respondent’s business developer Kevin Walker represented Respondent at the April 23 bargaining session and in the Association’s caucuses, but did not say anything during the meeting); Jt. Exh. 36 (pars. 4–5) (explaining Walker’s role as Respondent’s representative during negotiations).)

Following the unsuccessful ratification vote, Union business manager and lead negotiator Jim Sherwood contacted the Association on May 8 to report the ratification vote result and propose renewed negotiations. Sherwood stated as follows:

Hello all, as you probably already know the ratification vote that was held last night was rejected by the members of [L]ocal 123–238. On behalf of the [Union] negotiation committee I am requesting to continue negotiation so we can present a CBA that can be ratified. Please let me know if your group wants to continue and if so, please give me dates that you are available prior to the expiration of the contract extension (May 14th). [Thank you.]

(Jt. Exhs. 2 (pp. 3–4), 36 (par. 13); see also Tr. at 42–43.) After an exchange of emails, the Union and the Association agreed to meet on May 13 for another bargaining session. (Jt. Exh. 2 (p. 3).)

At the May 13 session, the Association and the Union could not reach a new agreement. After the meeting, however, representatives of the Association and the Union exchanged emails and, on May 14, reached a second tentative agreement (TA 2)

that included \$1.05 in combined increases for pension and wages in the first and second contract years, followed by a \$1.15 increase in year three of the contract. The Union agreed to present TA 2 to the bargaining unit for a ratification vote and cancel a planned strike, but only after the Association and the Union agreed to extend the old collective-bargaining agreement to May 23, 2019. (Jt. Exhs. 2 (pp. 1–2), 3, 22, 36 (pars. 14–16); Tr. 48–52, 133–135; see also Tr. 49–50, 134–135 (noting that Kevin Walker was present in the May 13 meeting as Respondent’s representative and caucused with the Association, but did not say anything during the meeting).)

C. May 17, 2019: Respondent Emails the Association and the Union about its Intent to Withdraw from the Association

1. Withdrawal provisions in the old collective-bargaining agreement

The guidelines for when a contractor may withdraw from the Association are set forth in Article 19 of the old collective-bargaining agreement. Article 19 states as follows, in pertinent part:

These Articles of Agreement shall be and are in full force and effect May 1, 2016 to/and including May 1, 2019, and from year to year thereafter unless either party notifies the other in writing at least 90 days prior to the date of expiration that a change in terms is requested. Any contractor that decides to withdraw from [the Association] and negotiate separately, may only do so at the expiration of this Agreement, provided such contractor provides written notice of withdrawal to the Union and the Association not more than 120 days before and not less than 90 days prior to the expiration date of this Agreement or by written notice to the Union and the Association at least 3 days before any extension of this Agreement is executed by the Association. The foregoing constitutes the entire contract conditions of employment between the parties hereto, and no verbal Agreements are binding.

(Jt. Exh. 1 (Art. 19).)

2. Respondent’s May 17 email

On May 17, 2019, one of Respondent’s attorneys emailed representatives of the Association and the Union and stated as follows:

All:

This law firm represents [Respondent]. [Respondent] is a member of [the Association], and is a party to the [collective-bargaining agreement] effective May 1, 2016 through May 1, 2019 (“Agreement”), which was extended by agreement of the parties through May 23, 2019.

Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is [Respondent’s] notice of withdrawal from the Association, contemporaneous with such extension. [Respondent] would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires.

If you have any questions about this notice, please contact the undersigned.

(Jt. Exh. 4; see also Jt. Exh. 36 (pars. 16, 57); Tr. 105, 147–148.) The Union received Respondent’s May 17 email and reviewed Article 19 of the expiring collective-bargaining agreement but did not respond to the May 17 email. (Tr. 105–106.)

D. May 23–28, 2019: Further Bargaining Between the Association and the Union

On May 23, the Union presented TA 2 to its members for a ratification vote. The Union members voted to reject TA 2, and thereafter went on strike effective May 24. The Union, through Sherwood, notified the Association of the unsuccessful ratification vote and suggested that the Association and the Union resume negotiations. (Jt. Exhs. 23, 36 (pars. 18–19) (noting that Union members remained on strike on May 25–26 and did not work on May 27 because that day was Memorial Day); Tr. 52, 56, 135–136.)

On May 27, the Union and the Association agreed to meet on May 28 to see if they could agree on a new tentative agreement and, if so, also agree on another contract extension so union members could return to work. Separately, members of the Association emailed each other to express their support for meeting on May 28 and extending the expiring collective-bargaining agreement. Respondent, however, advised the other Association members that it was “willing to have the Association enter into a short-term extension but votes no on the proposed tentative agreement.” (Jt. Exhs. 5, 36 (par. 21); Tr. 55–60, 93–94.)

The Association and the Union next met on May 28. In a relatively short meeting lasting around one hour, the Union and the Association worked out a tentative agreement (TA 3) that included a wage increase of \$0.69 and a pension increase of \$0.46 (\$1.15 total) in each of the first, second and third contract years. After agreeing on TA 3, the Union and the Association also agreed to extend the old collective-bargaining agreement through June 5, 2019, to allow Union members to end the strike and return to work until they could conduct the ratification vote (scheduled for June 5). Walker was present at the May 28 meeting on Respondent’s behalf and caucused with the Association but did not say anything during the meeting (and thus, did not say anything about TA 3 or Respondent’s status as a member of the Association).⁵ There is no evidence that the Union or the Association said anything during the meeting about whether Respondent was still a member of the Association. (Jt. Exhs. 6, 24, 36 (pars. 22–23) (noting that Union members were still on strike in the morning on May 28); Tr. 60–67, 108–109, 136–138, 148.)

After the May 28 meeting, the Union notified its members that the strike was over (in light of TA 3 and the contract exten-

⁵ Walker left the meeting before the Union and the Association signed the contract extension. (Tr. 108–109 (explaining that Sherwood signed for the Union and Rick Lane, the representative for another contractor, signed for the Association by exchanging the document via email; the other contractor representatives, including Walker, had already departed by that time).)

sion) and that they could return to work for the rest of May 28, or report to work as normal on May 29. Respondent's employees in the bargaining unit returned to work on May 28 and/or May 29. (Jt. Exh. 36 (par. 24); Tr. 18–19, 67–68, 138–139; see also Tr. 109–111 (noting that the old collective-bargaining agreement included a no-strike clause that obligated Union members to return to work once the contract was extended to June 5, 2019).)

E. Respondent and the Union Dispute Whether Respondent Remains in the Association

After the bargaining developments and contract extension on May 28, Respondent (through counsel) emailed the Union and the Association about its status. Respondent stated as follows in its May 28 email:

To [the Union] Negotiating Committee:

The Association and Union agreed today to an extension of the Agreement through 11:59 PM, June 5, 2019, at which time the Agreement will terminate. Accordingly, pursuant to the notice that we emailed you and the Association on May 17, 2019 [], [Respondent] is no longer represented by the Association, and no agreement reached between the Association and Union that would be effective after expiration of the current extension will apply to [Respondent]. [Respondent] offers to begin separate negotiations with the Union for a new agreement to replace the Agreement when the extension expires. We propose meeting on May 30, 2019 at 10:30 am at the Union hall to begin our negotiations. If the Union is unavailable that day, please provide your first available date(s). In the meantime, [Respondent] understands that the Agreement remains in effect for [Respondent] and its employees until the current extension expires.

(Jt. Exh. 7; see also Jt. Exh. 36 (par. 25).)

The Union, through counsel, replied on May 29 with an email asserting that Respondent was bound by both TA 3 and the contract extension. The Union stated as follows in its email:

[Counsel for Respondent] – thank you for taking my call for today. After we talked, I contacted our client to determine the position of [the Union] regarding your client's request to negotiate on May 30, 2019. . . .

[The Union] takes the position that [Respondent] participated in the video conference discussion yesterday, in which Association members also participated. The discussion concluded with an agreement from all participating parties that the contract would be extended through 11:59 PM on June 5, 2019, and the Union would present [TA 3] to its members for ratification before that time. [Respondent's representative] did not exclude himself or [Respondent] from either the extension or [TA 3]. [The Union] understood, from [Respondent's] previous notice on May 17, 2019, that it was representing itself in the video conference yesterday, but at no time did [Respond-

ent] voice objection or disagreement to the aforementioned terms decided upon in the conference.

For these reasons, [the Union] takes the position that [Respondent] agreed with both terms, [TA 3] and the extension, and negotiations are not necessary at this time. I am available for further discussion, if any is necessary.

(Jt. Exh. 8; see also Jt. Exh. 36 (par. 27).)

Respondent's counsel sent a reply email to the Union on May 30, stating as follows concerning Respondent's status:

[Respondent] disagrees with the Union's position, as set forth in your [May 29 email], that [Respondent] is bound to [TA 3] allegedly entered into by the [Association] and the Union on May 28, 2019.

On May 17, 2019, in an email from [Respondent's counsel, Respondent] served the following notice on the Union and Association:

"Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is [Respondent's] notice of withdrawal from the Association, contemporaneous with such extension. [Respondent] would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires."

Article XIX expressly allows members of the Association to "withdraw from the . . . Association and negotiate separately . . . by written notice to the Union and the Association at least 3 days before any extension of this Agreement is executed by the Association.

On May 28, 2019, 11 days after [Respondent's] counsel served the above referenced Article XIX notice, the Union and Association executed a "Contract Extension Agreement" that extends the Agreement until 11:59 PM on June 5, 2019. Accordingly, on May 28, 2019, by operation of Article XIX and [Respondent's] Article XIX notice, [Respondent] separated from the Association, and is not bound by any alleged Tentative Agreement or any other agreements between the Association and Union that would be in effect after June 5.

Your e-mail argues that the presence and silence of [Respondent's] representative at the meeting on May 28 means [Respondent] acquiesced in the alleged [TA 3]. However, [Respondent] was not "silent"; the Union and Association were informed by e-mail 11 days in advance by the Article XIX notice that [Respondent] would separate from the Association and bargain for its own separate agreement if the Association and Union executed another extension. They did so with

full knowledge of the consequences as to [Respondent], having been so notified in more than 3 days in advance.

Moreover, while it is arguable that [Respondent] is not bound by the Contract Extension Agreement, [Respondent] is committed to compliance with the Agreement through 11:59 pm on June 5, 2019. After that date, [Respondent] will maintain the status quo as required by law pending negotiation to agreement or impasse. [Respondent] would not be bound to a further extension agreement between the Association and Union unless [Respondent] separately agrees to it.

As to negotiations for a new agreement, please find attached the Company's Proposal. We again offer to meet and bargain for a new agreement.

(Jt. Exh. 9 (p. 1); see also Tr. 69–70; Jt. Exhs. 9 (pp. 3–13) (Respondent's May 30 contract proposal), 36 (par. 29) (stating that Respondent was not representing itself at the May 28 meeting since its withdrawal from the Association did not occur until the Association and the Union executed the contract extension at the end of the May 28 meeting).)

The Union did not reply to Respondent's May 30 email between May 30 and June 5, 2019, and the Union and Respondent have not met to bargain for a collective-bargaining agreement since the May 28 meeting with the Association. (Jt. Exh. 36 (par. 28); Tr. 71.)

F. Summer 2019: The Union and the Association Finalize their New Collective-Bargaining Agreement

On June 5, Union members held a ratification vote and approved TA 3. (Jt. 36 (par. 31); Tr. 72, 148; see also Tr. 99 (noting that the Union permitted Respondent's employees to participate in the ratification vote).) Thereafter, on an unspecified date, the Union prepared a new collective-bargaining agreement based on TA 3 and the old agreement. After an Association representative approved the new agreement, the Union sent the new agreement to Association members for signature.⁶ (Jt. Exh. 11; Tr. 149–150; see also Tr. 113 (noting that the Union sent a copy of the new agreement to Respondent on October 22, 2019).)

With TA 3 ratified, the Union turned its attention to the wage allocation process, through which the bargaining unit may opt to redistribute the wage package, such that more (or less) money goes to employee wages, pension, health insurance, or other benefits as long as the bottom line for employers does not change. First, on June 26, 2019, the Union and the Association prepared and signed a wage sheet setting forth (consistent with

TA 3) employee wages and the amount of money that would be directed to various funds and employee benefits, retroactive to May 1, 2019. (Tr. 72–77, 96, 111, 139, 149; Jt. Exhs. 10, 10A, 36 (par. 36); see also Jt. Exh. 1 (p. 1) (showing the results of the wage allocation process for the final year of the old collective-bargaining agreement); Tr. 86.)

Next, on about July 11, the Union met with its members to discuss whether and how, as a bargaining unit, they wished to redistribute the wage package. The bargaining unit decided that, instead of receiving a \$0.69 wage increase for the first contract year, it would redirect that money to the health and welfare benefit (\$0.61) and pension (\$0.08). The Union subsequently sent an updated wage sheet to the Association for review and approval.⁷ (Tr. 96–97, 111–112, 139–140, 144–145, 149, 155–156.)

G. Summer 2019: Respondent Takes Steps Related to Bargaining Separately with the Union

1. Memorandum to new hires

In early summer 2019, Respondent began issuing a memorandum to new hires. In the memorandum, Respondent stated that it was not currently a party to any labor agreement but noted that the Union represented the bargaining unit. Respondent added that new hires could join the Union and have union dues deducted from their paycheck if they wished. (Jt. Exhs. 18, 36 (par. 33).)

2. Respondent files unfair labor practices charge against the Union

On June 6, Respondent filed an unfair labor practices charge (Case 09–CB–242861) against the Union for failing and refusing to bargain with Respondent for a separate collective-bargaining agreement. (Jt. Exhs. 12, 36 (par. 32); see also Jt. Exhs. 13, 29, 36 (par. 46) (noting that Region 9 filed a complaint against the Union in Case 09–CB–242861 on October 1, and the Union filed an answer to the complaint on October 14).)

3. Respondent makes changes to fund payments

On June 16, Respondent emailed the Union to outline how Respondent planned to handle fringe benefit contributions. Respondent stated as follows:

In follow-up to [Respondent's May 30 email], I wanted to advise you that [Respondent] intends to maintain the status quo with respect to wages and fringe benefit contributions as required by law while [Respondent] and the Union negotiate a new agreement or until the parties reach impasse. The Union believes that [Respondent] is bound to the new agreement [reached with the Association]; [Respondent] disagrees. The Labor Board is involved to determine the parties' obligations.

As you are aware, in the new agreement, the parties to that agreement decided to reduce the contribution to the [T]arget fund from \$0.25/hour to \$0.05/hour. Although [Respondent] will make other contributions directly to the fringe benefit

⁶ The new collective-bargaining agreement states that it is effective for 2 years, from May 1, 2019, through May 1, 2021, but Sherwood testified at trial that the agreement (like TA 3) is a 3-year agreement and that the shorter time frame shown in the agreement is the result of a clerical error. (Compare Jt. Exh. 11 with Tr. 89–90, 112–114.) I do not take a position on this issue since the length of the Union's new contract with the Association is not material to my analysis of this case.

⁷ The evidentiary record does not include a copy of the updated wage sheet that the Union distributed after July 11.

funds as provided in the old agreement, it will not continue to send \$0.25/hour directly to the [T]arget fund because if the Union prevails in its position that [Respondent] is bound to the new agreement, [Respondent] would have only been obligated to pay \$0.05/hour. Instead of remitting the entire amount, [Respondent] will remit only \$0.05/hour, and it will set aside \$0.20/hour. If the charge is dismissed and the dismissal is affirmed by the Office of Appeals, and [Respondent] is bound under the new agreement, the money set aside will return to [Respondent]. If not, depending on the Labor Board's determination and/or course of action, [Respondent] will determine its course of action in accordance with its legal rights and obligations.

Similarly, [Respondent] understands the parties to the new agreement cancelled a \$0.03 deduction for a [Drug Free Workplace]⁸ program. Like the \$0.20, [Respondent] will deduct and set aside \$0.03/hour for all hours worked. If the charge is dismissed and the dismissal [is] affirmed by the Office of Appeals, and [Respondent] is bound under the new agreement, [Respondent] will return the money to its employees. If not, depending on the Labor Board's determination and/or course of action, [Respondent] will determine its course of action in accordance with its legal rights and obligations.

(Jt. Exh. 16 (p. 1); see also Jt. Exhs. 1 (p. 1) (describing the payments to the Target Fund and Drug Free Workplace program under the old collective-bargaining agreement), 36 (pars. 34–35); Tr. 85–89.)

The following day, Union acknowledged receiving Respondent's June 16 email and advised that it (the Union) would provide a substantive response in a day or two. (Jt. Exhs. 16 (p. 1), 36 (par. 36).)

H. Summer 2019: the Union Files a Grievance to Contest Respondent's Failure to Adhere to the New Association/Union Collective-Bargaining Agreement

On June 28, 2019, the Union filed a grievance against Respondent to allege that Respondent was refusing to recognize the new collective-bargaining agreement between the Union and the Association (the Association/Union agreement), and was refusing to make certain contributions required under the old collective-bargaining agreement. (Jt. Exhs. 25, 36 (par. 38); Tr. 97–98.)

In a reply email dated July 1, Respondent offered to meet with the Union to discuss the grievance. Respondent also reiterated its position that it is not bound by the new Association/Union agreement and renewed its offer to meet and bargain with the Union for a separate collective-bargaining agreement. (R. Exh. 1 (p. 1); see also R. Exh. 1 (pp. 1, 3–9) (indicating that, on July 8, Respondent provided information to the Union in response to an information request related to the grievance);

⁸ In some of its correspondence, Respondent refers to the Drug Free Workplace program as the "Drug & Alcohol" program. (See, e.g., Jt. Exhs. 16, 28.) For clarity, I use the term Drug Free Workplace program in this decision.

Tr. 116–117 (same).)

Respondent's counsel and Sherwood initially arranged to meet about the grievance on July 22. On July 17, however, the Union canceled the grievance meeting after learning that Respondent's counsel planned to serve as Respondent's chief spokesperson at the meeting. The Union stated that it would propose alternative grievance meeting dates when its counsel could also be present, but ultimately did not do so. (R. Exh. 2; Tr. 118–122.)

I. September–October 2019: Respondent Declares Impasse and Prepares to Unilaterally Implement Terms and Conditions of Employment

1. September 13: Respondent sends another contract proposal

On September 13, 2019, Respondent sent a contract proposal to the Union and proposed meeting on September 16. Respondent also explained that the contract proposal was the same as the proposal that it sent on May 30, except for a later expiration date and the addition of specifics as to alternative group health insurance.⁹ On the specific topics of wages, pension, health care and union security, Respondent summarized its proposal as follows:

Wage Rates. The Company proposes a minimum rate of \$25.86 per hour for its Journeymen Painters, \$19.73 per hour for its Intermediate Painters, and \$14.79 per hour its Apprentice Painters, with no mandatory deductions for any fringe benefits. We believe these rates are higher than the wage rates that would be paid to most or all of our employees under the Association's proposed terms. These higher rates are based on elimination of the Target Fund, PAT, Building Fund, FTI, LMCI and Drug Free Workplace plans from the contract.

Pension. The Company no longer wishes to participate in a pension plan that is grossly underfunded and unlikely to become fully funded. The Company is willing to pay any withdrawal liability required by law to end its participation. Whether, when and how much the Company would contribute to a 401k Plan for employees will depend on the amount of withdrawal liability.

Group Health Insurance. The Company is willing to continue participating in the Southern Ohio Health and Welfare Fund if the Union agrees. If not, the Company will offer a group health care plan to its Union-represented [employees] that will be the same plan offered to its non-Union employees. . . .

Union Security. The attached [proposal] eliminates the re-

⁹ Respondent accurately described the differences between the May 30 and September 13 contract proposals. (Compare Jt. Exh. 9 (pp. 4–13) with Jt. Exh. 14 (pp. 4–14).) Accordingly, I do not credit Sherwood's testimony about how those two proposals differ. See Tr. 78–79. It appears that Sherwood misspoke; the comparison that he made appears to be between Respondent's September 13 proposal and the old collective-bargaining agreement between the Union and the Association.

quirement that employees pay Union dues to keep their jobs and the dues check-off provision. The Company will reconsider this if it is the only issue that stands in the way of the agreement.

(Jt. Exhs. 14 (pp. 1, 3–4), 36 (par. 39).)

Later in the day, the Union responded that a meeting on September 16 would not be possible. Respondent asked the Union to propose available dates for bargaining, but the Union did not respond further. (Jt. Exh. 26 (p. 1).)

2. September 19–23: Respondent declares impasse and states that it plans to implement its September 13 proposal on November 1

On September 19, Respondent emailed the Union to assert that the parties were at impasse and that Respondent planned to implement its September 13 contract proposal. Respondent stated as follows in its email:

The Company withdrew from the [Association] effective May 28, 2019. That same day, The Company first asked the Union to meet and bargain for a new agreement to replace the one that was then in effect when it expired. On May 30, 2019, the Company sent the Union its contract proposal and again asked to meet. The Union failed and refused to meet with the Company.

On September 13, 2019, the Company sent the same contract proposal to the Union, except for a later expiration date and inclusion of a benefit summary for a Company group health plan, and again asked to meet and bargain[.] . . .

The Union has failed to respond to our repeated requests for available dates to meet and bargain for a new agreement. Under these circumstances, it is clear that the Union has no intention to meet and bargain with the Company for a new agreement, a refusal that has now continued for almost four months. It is also clear that further attempts to bargain with the Union would be futile. Therefore, the parties are at impasse.

Accordingly, this email serves as notice to the Union that the Company plans to implement the attached Proposal effective at 12:01 am on October 23, 2019. Implementation will not include proposed management rights language that if part of a new agreement would constitute a waiver of the Union's bargaining rights.

(Jt. Exh. 26 (p. 1); see also Jt. Exh. 36 (par. 40).) At trial, Sherwood agreed that from May 30 through September 19, the Union and Respondent did not bargain for a separate contract, and the Union did not make any counteroffers to Respondents May 30 and September 13 contract proposals. The Union took this approach because it believed Respondent was bound by TA

3. (Tr. 79–80.)

On September 20, Respondent contacted the Union to advise that Respondent would be implementing its contract proposal on November 1, instead of October 23. Respondent explained that this delay arose because Respondent could not implement its proposed group health plan until November 1. In connection with this change, Respondent advised that it would “continue to pay the contributions to the Painters Health & Welfare Fund and all of the other fringe benefit funds for all bargaining unit hours worked through October 31, 2019.” (Jt. Exh. 15; see also Jt. Exh. 36 (par. 41).) Consistent with these developments, on September 23, Respondent notified its employees of its declaration of impasse and plan to implement its contract proposal on November 1. The Union, meanwhile, filed an unfair labor practices charge (Case 09–CA–248716) against Respondent. (Jt. Exhs. 27, 36 (pars. 42, 44); GC Exh. 1(a).)

3. September 24: Respondent contacts the Union about contributions to the Target Fund and the Drug Free Workplace program

By late September, Respondent had learned that Region 9 of the National Labor Relations Board would be issuing a complaint against the Union in Case 09–CB–242861. Respondent saw that development as support for its position that it (Respondent) is not bound by the new Association/Union collective-bargaining agreement. Accordingly, Respondent notified the Union that it would “send the 20 cents per hour that has been set aside to the Target Fund, and going forward [would] send 25 cents per hour to the Target Fund, through October 31, 2019.” (Jt. Exh. 28; see also Jt. Exh. 13 (NLRB complaint in Case 09–CB–242861, filed on October 1, 2019, alleging that the Union violated the Act by failing and refusing to bargain with Respondent over terms and conditions of employment).)

Respondent was less certain about the Drug Free Workplace program contribution. Respondent advised the Union that it did not (as originally planned) set aside 3 cents per hour for this program because “it could not determine where on the Union wage/benefit worksheet that payment was located” and was not sure whether the payment was “subsumed in one of the other fund contributions” that Respondent had been making and would continue to make through October 31, 2019. Respondent therefore asked the Union about the status of the 3 cents per hour contribution for the Drug Free Workplace program. (Jt. Exh. 28.)

4. October 2019: Respondent moves forward with its plan to implement terms of employment on November 1

In October, Respondent continued to prepare to implement terms of employment on November 1. Thus, on October 7, Respondent sent the Union a copy of its “Implemented Terms Handbook,” which Respondent planned to give to bargaining unit employees to set forth the terms of employment that would take effect on November 1. (Jt. Exh. 30; see also Jt. Exh. 36 (par. 47); Tr. 81 (noting that the terms of Respondent's proposal differ from TA 3).)

On October 18, Respondent advised the Union that it would be proposing a different group health plan than what it provided on September 13. Respondent offered to meet with the Union to discuss its contract proposal and revised group health plan,

but noted that based on recent Union communications, Respondent “assumes that this request to meet and bargain is futile . . . [and] plans to move forward with implementation of its [September 13] Proposal, as modified by the attached [group health plan], on November 1, 2019. If the Union’s position changes, let us know.” (Jt. Exh. 32; see also Jt. Exh. 36 (par. 49).)

On October 24, Respondent emailed the Union to provide two documents that it planned to give to employees to describe the benefits in its proposed group health plan. Respondent also advised the Union that Respondent “has decided to add a GAP Plan to the group health plan at no cost to employees that reduces the [maximum] annual out-of-pocket costs . . . [and] offer 3 voluntary benefits at employee cost, vision dental and term life.” Respondent reiterated that it was willing to meet and discuss its proposal but would continue to assume that its request to meet and bargain is futile unless the Union notified Respondent of a change in the Union’s position. (Jt. Exh. 34; see also Jt. Exh. 36 (par. 52).)

5. October 2019: the Union maintains that Respondent is obligated to sign the new Association/Union collective-bargaining agreement

In the same time period that Respondent was preparing to implement terms of employment on November 1, the Union was asserting that Respondent was bound by TA 3 and that Respondent should maintain the status quo while the parties litigated their dispute. Consistent with that perspective, on October 16, the Union sent the following email to Respondent:

As you are aware by now, the declaration by [Respondent] last month that it is at impasse, and that [Respondent] will implement unilaterally the terms and conditions of employment outlined in its Company Proposal which was last presented to us on October 7, 2019, prompted the [Union] to file an unfair labor practice charge against [Respondent]. Specifically, [the Union] disputes any impasse because it does not believe it is required to be engaged in bargaining, and [the Union] seeks to preserve the status quo of the parties pending a determination of the underlying dispute.

The Union maintains its position that [Respondent] is bound to the agreement ratified . . . on June 5, 2019, despite Region 9’s issuance of a Complaint alleging otherwise. [The Union] is defending its position on this, having answered the Complaint and being prepared to present its evidence to an Administrative Law Judge[.]. [The Union] has every intention of negotiating with [Respondent] if the Board determines that [Respondent] is not bound to the current agreement. In the meantime, [Respondent] should maintain the status quo between the parties by adhering to the terms of the now-expired contract instead of resorting to self-help by imposing its Company Proposal. Again, [the Union] will negotiate with [Respondent] after there is a Board Order that establishes [the Union] is obligated to do so.

In light of the foregoing, please indicate whether your client still intends to implement on November 1, 2019, its Company

Proposal with regard to [the bargaining unit].

(Jt. Exh. 31.)

Respondent answered the Union’s email on October 18, stating as follows regarding the Union’s request to maintain the status quo:

The Union continues its unlawful refusal to meet with [Respondent] to bargain for a new agreement. Accordingly, the parties are at impasse as to [Respondent’s September 13] Proposal, including the revised proposed new group health plan emailed to you earlier this afternoon. Moreover, even if the parties were not at impasse, the Union’s ongoing refusal to bargain allows [Respondent] to implement its proposed terms. And so [Respondent] plans to implement its pending proposals (except for those that would require a signed agreement) on November 1, 2019.

We understand the Union’s position that [Respondent] is bound by the new Association Agreement. [Respondent] and Region 9 of the NLRB disagree, based on [Respondent’s] timely withdrawal from the Association. [Respondent] will not wait the years it will take for a final judgment to move forward.

If the Union changes its position and is willing to meet and bargain for a new agreement, let us know.

(Jt. Exh. 31.)

On October 22, the Union sent Respondent a copy of the new Association/Union collective-bargaining agreement. Later that day, Respondent emailed the Union to state that Respondent would not be signing the new agreement because Respondent withdrew from the Association in a timely manner while negotiations were still ongoing. Respondent also asserted that it could not be bound by the new collective-bargaining agreement because that agreement included substantial changes that occurred after the Union’s ratification vote (of TA 3) on June 5, including the changes to wages and the contributions rates for pension and health/welfare.¹⁰ (Jt. Exhs. 33, 36 (pars. 51–52).)

J. October 28—November 1, 2019: The Final Days Before Respondent Implements Terms and Conditions of Employment

1. October 28, 2019: Respondent communicates with employees about the implementation of terms of employment on November 1

On about October 28, Respondent provided employees with a memorandum and handbook that described the terms of employment that would take effect on November 1. Respondent’s

¹⁰ Consistent with the Union’s wage allocation on July 11, wages were frozen for the first year of the contract (instead of the \$0.69 wage increase in TA 3) and the savings were reallocated to increase contributions for pension (\$0.08) and health/welfare (\$0.61). (Compare Jt. Exh. 33 (p. 2) with Findings of Fact (FOF), Sec. II(F), *supra* (describing the Union’s July 11 wage allocation).)

memorandum stated as follows, in pertinent part:

In accordance with the new terms [of employment], the Company will no longer make contributions to the Union fringe benefit plans, and will stop deducting Union dues and fringe contributions from your paychecks, for hours worked on and after November 1, 2019. If you wish to maintain your Union membership after November 1, the choice is yours, but you will have to make arrangements to pay your dues directly to the Union.

Your new (higher) wages, effective November 1, 2019, can be found on page 3.

Although the Union has refused to bargain with the Company for a new contract, the Union is still your collective bargaining representative. The Company may not and will not bargain directly with its Union-represented employees about the attached or other terms of employment.

(Jt. Exhs. 19, 36 (par. 53).)

Also, on October 28, Respondent called a meeting with its employees to explain how it would implement terms of employment on November 1. Towards the end of the meeting, employee David Henn and Respondent's Chief Financial Officer Jack Varney, Jr. had the following exchange:

Henn: So let me get this straight, these are my two options? I either have to take what you're offering me, even though you don't have anything solid put together, I have to take what you have to offer or find another [union] contractor to work for after Friday . . . if I want to keep my benefits[?]

Varney: Yes.

(Tr. 169–170, 174–175; Jt. Exh. 36 (pars. 4, 54).)

2. October 29, 2019: Respondent rejects the Union's request to maintain the terms of the expired collective-bargaining agreement while the parties litigate their dispute

In a final attempt to address Respondent's plan to implement its terms of employment, the Union emailed Respondent on October 29 and stated as follows:

Please be advised that [Union] members are willing to continue working for [Respondent] under the terms and conditions of the now-expired CBA, while the NLRB determines the rights and responsibilities of both [the Union and Respondent] as challenged in two (2) pending unfair labor practice charges.

The Union again states its willingness to negotiate with [Respondent] if the NLRB determines [Respondent] is not bound to the newly ratified CBA of June 5, 2019. As you know, the Union believes [Respondent] is bound to the newly ratified CBA but it has deferred action to enforce the new CBA terms until the NLRB decides the issue raised by [Respondent] in its June 7 unfair labor practice charge against the Union.

We understand from your [October 24 email] that [Respondent] does not intend to maintain the status quo but will implement its Company Proposal on November 1, 2019. The Union remains committed to maintaining the status quo pending resolution by the NLRB of the underlying dispute. Please advise if your client's position changes.

(GC Exh. 2.)

In a reply email dated October 29, Respondent asserted that it "has maintained the status quo as to wages and benefits" since the old collective-bargaining agreement expired, including "sending checks for the various Union benefit funds in the amounts required under the expired CBA." Respondent reconfirmed, however, that it "has the right to implement its pending Proposal, due to the Union's continued refusal to bargain, and will do so on November 1, 2019." (R. Exh. 3 (noting that Respondent sent a check to the Union to cover the September Target Fund and certain other fund contributions, but the check was returned).)

3. November 1, 2019: Respondent implements its terms and conditions of employment

As planned, on November 1, Respondent implemented the terms of its September 13, 2019 contract proposal. Accordingly, Respondent unilaterally: ended participation in the IUPAT Union and Industry National Pension Fund; withdrew from the Southern Ohio Painters Health and Welfare Fund (and instead offered bargaining unit employees the same group health plan offered to non-bargaining unit employees); and changed the wage rates of bargaining unit employees. (Jt. Exhs. 30 (pp. 8–9, 18–21, 24), 36 (pars. 28, 56).)

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

B. Did Respondent Violate Section 8(a)(5) and (1) of the Act by Refusing to Adhere to the New (June 2019) Association/Union Collective-Bargaining Agreement?

1. Complaint allegations

The General Counsel alleges that Respondent violated Sec-

tion 8(a)(5) and (1) of the Act by, since about May 30, 2019, refusing to adhere to the collective-bargaining agreement that the Association and the Union agreed to on May 28, 2019, and executed on June 5, 2019.

2. Applicable legal standard

Normally, the question of whether a party is obligated to execute an agreement allegedly reached during collective-bargaining negotiations will require analysis of whether the parties reached a “meeting of the minds” on all substantive issues and material terms of the agreement. See, e.g., *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006) (explaining that if the parties in collective-bargaining negotiations reach a meeting of the minds on an agreement and the written contract reflects the parties’ agreement, then a party who refuses a request to execute the contract runs afoul of the Act).

The facts of this case, however, raise a preliminary issue regarding whether Respondent withdrew from the Association before the Union and the Association reached a meeting of the minds on May 28, 2019 (as reflected in TA 3, which was subsequently ratified). The Board has explained that “where an employer is contractually bound to a multiemployer bargaining agency relationship, its withdrawal from that relationship is not ‘free and uninhibited’ and that attempts to withdraw must be timely and unequivocal. The Board will refuse to permit the withdrawal of an employer from a multiemployer bargaining arrangement, except upon adequate written notice given prior to the date set by the contract for modification or the agreed upon date to begin the multiemployer negotiations. Where actual negotiations have commenced, the Board does not permit, ‘except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.’” *Midland Electrical Contracting Corp.*, 365 NLRB No. 87, slip op. at 2 (2017) (citing *Retail Associates, Inc.*, 120 NLRB 388, 393, 395 (1958)), enf. 774 Fed. Appx. 85 (3d Cir. 2019).

3. Analysis

In Article 19 of the old collective-bargaining agreement, the Union and the Association consented to the rules that govern when a contractor may withdraw from the Association and negotiate separately. First, a contractor may withdraw from the Association when the collective-bargaining agreement expires, but only if the contractor “provides written notice of withdrawal to the Union and the Association not more than 120 days before and not less than 90 days prior to the expiration date” of the collective-bargaining agreement. Second, a contractor may withdraw from the Association “by written notice to the Union and the Association at least 3 days before any extension of [the collective-bargaining agreement] is executed by the Association.” (FOF, Sec. II(C)(1).)

There is no dispute that the Association and the Union began negotiating for a new collective-bargaining agreement on about February 11, 2019, before Respondent took any steps towards withdrawing from the Association. Given that fact, Board law only permits Respondent to change course and withdraw from the Association if Respondent can establish mutual consent or unusual circumstances. Respondent maintains that it did have mutual consent to withdraw based on the terms of Article 19 of

the old collective-bargaining agreement, and contends that it gave timely and unequivocal notice of its withdrawal from the Association through its May 17 email to the Association and the Union, in which Respondent stated:

Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is [Respondent’s] notice of withdrawal from the Association, contemporaneous with such extension. [Respondent] would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires.

(FOF, Sec. II(C)(2).)

I agree with Respondent that, through its May 17 email, Respondent provided timely and unequivocal notice of its withdrawal from the Association as permitted in Article 19. As a preliminary matter, I find that the Association and the Union (in Article 19) mutually consented to allowing contractors to withdraw from the Association by written notice at least 3 days before any extension of the collective-bargaining agreement is executed by the Association. In *Acropolis Painting*, the Board held that an employer could rely on the agreed-upon contractual procedure for withdrawing from the multiemployer bargaining unit even though the union and multiemployer group had already begun negotiations for a new contract. 272 NLRB 150, 150, 156–157 (1984). The same logic applies here, as in Article 19 the Union and the Association consented to a procedure that permits a contractor to withdraw from the Association if the contractor provides written notice at least 3 days before the Association executes any contract extension.¹¹

Turning, then, to Respondent’s May 17 email, I find that Respondent’s notice of withdrawal was timely. For its notice to be timely, Respondent only had to avoid sending the notice less than 3 days before the Association executed any contract extension. Respondent satisfied that rule, as it sent the notice on May 17, and the Association did not execute a contract extension in the following 3 days. Accordingly, Respondent’s withdrawal notice became timely and effective as of May 21.

I also find that Respondent’s notice was unequivocal, though I acknowledge that the case is somewhat close on this point. In its May 17 email, Respondent explicitly stated that the email was its notice of withdrawal from the Association and that Respondent planned to negotiate separately with the Union on its own behalf. Respondent, however, took the position (as it did during trial) that its withdrawal would not take effect until the Association actually executed a contract extension. Consistent with its view, Respondent advised the Association on May 27

¹¹ For these reasons, I am not persuaded by the General Counsel’s argument that Board policy weighs against permitting Respondent to withdraw from the Association after negotiations have begun. (GC Posttrial Br. at 14–16.) The Board has recognized that a party may withdraw from multiemployer bargaining after the start of negotiations if the party can establish “mutual consent,” and Article 19 establishes mutual consent to allow a contractor to withdraw from the Association if the contractor provides written notice to the Union and the Association at least 3 days before the Association executes any contract extension.

that it (Respondent) voted “no” on the proposed tentative agreement but did not oppose a contract extension; and attended the May 28 bargaining session but did not say anything during the session. The Union, meanwhile, received Respondent’s May 17 email and believed that Respondent was representing itself at the May 28 bargaining session (instead of attending as a member of the Association). (FOF, Sec. II(D)–(E).)

After considering Respondent’s May 17 email and all surrounding circumstances, I find that Respondent unequivocally indicated its intent to leave the Association to bargain separately. Under the terms of Article 19 of the old contract, Respondent’s May 17 withdrawal became effective as of May 21 because Respondent provided the notice at least 3 days before any contract extension. To the extent that Respondent (incorrectly, in my view) believed that its withdrawal would not take effect until the Association executed a contract extension, I note that Respondent’s misimpression was not binding. (See FOF, Sec. II(C)(1) (Article 19, stating that the collective-bargaining agreement “constitutes the entire contract conditions of employment between the parties hereto, and no verbal Agreements are binding”).) Further, the Union understood (based on Respondent’s May 17 email) that Respondent intended to represent itself in negotiations, and I do not find that Respondent’s silent presence at the May 28 meeting nullified Respondent’s withdrawal from the Association. And, perhaps most important, the evidentiary record does not show that Respondent tried to have the best of both worlds by attempting to secure favorable terms in the Association’s new contract with the Union while reserving the right to reject any agreement that it did not like. To the contrary, Respondent immediately reached out to the Union to start separate bargaining after the May 28 contract extension (see FOF, Sec. II(E)), and continued along that path thereafter. See *Ladies Garment Workers (West Side Sportswear)*, 286 NLRB 226, 226 fn. 2, 231 (1987) (finding that the employer’s “negligible” participation bargaining did not nullify the employer’s prior withdrawal from multiemployer bargaining, particularly in the absence of evidence that the employer was attempting to preserve the option of either signing or rejecting the new multiemployer contract), enfd. 853 F.2d 918 (3d Cir. 1988); see also *Walt’s Broiler*, 270 NLRB 556, 557–558 (1984) (employers unequivocally indicated that they wished to use the same negotiator and continue their membership in the employers’ association but retain the right to not be bound to any agreement as a group, and therefore effectively withdrew from multiemployer bargaining).¹²

¹² The General Counsel correctly pointed out that an employer may nullify its withdrawal from a multiemployer bargaining association by taking actions inconsistent with the withdrawal (see GC Posttrial Br. at 17–18), but the cases that the General Counsel cited are readily distinguishable. Briefly, in each of the following cases, the employer actively participated in multiemployer bargaining after its purported withdrawal, and consequently engaged in withdrawal-nullifying activity that went far beyond Respondent’s activity here (silently attending the May 28 meeting). See, e.g., *Dependable Tile Co.*, 268 NLRB 1147, 1147, 1150 (1984) (employer withdrew from multiemployer association but then actively participated in 6 bargaining sessions as part of the association’s negotiating committee), enfd. in pertinent part, 774 F.2d 1376 (9th Cir. 1985); *Michael J. Bollinger Co.*, 252 NLRB 406, 407 (same,

In sum, I find that Respondent, through its May 17 email, timely and unequivocally withdrew from the Association based on the withdrawal provisions that the Association and the Union established in Article 19 of the old collective-bargaining agreement. Since Respondent’s withdrawal from the Association was effective on May 21, Respondent is not obligated to execute the collective-bargaining agreement that the Union and the Association agreed to on May 28.¹³ I therefore recommend that this complaint allegation be dismissed.

C. Did Respondent Violate Section 8(a)(5) and (1) of the Act by Unilaterally Changing Bargaining Unit Employee Terms and Conditions of Employment?

1. Complaint allegations

The General Counsel alleges that Respondent, on about June 16, 2019, unilaterally ceased its contributions to the Drug Free Workplace program and reduced its contributions to the Target Fund without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

The General Counsel also alleges that Respondent, on about November 1, 2019, unilaterally changed bargaining unit employees’ wage rates, withdrew from the Southern Ohio Painters Health and Welfare Fund, and ceased participation in the IUPAT Union and Industry National Pension Fund without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

2. Applicable legal standards

Under Section 8(a)(5) and (1) of the Act, the unilateral change doctrine establishes that an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.¹⁴ The Act prohibits employers from taking unilateral action

where employer actively participated in 4 out of 5 bargaining sessions and served as the association’s chief spokesperson in 3 of the 4 sessions attended), enfd. 705 F.2d 444 (4th Cir. 1983); *Associated Shower Door Co.*, 205 NLRB 677, 682 (1973) (the union objected to the employers’ withdrawal notices and the employers subsequently appeared and participated in multiemployer bargaining sessions), enfd. 512 F.2d 230 (9th Cir. 1975); see also *Sheet Metal Workers’ International Association Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 246–247 (3d Cir. 1999) (employer nullified withdrawal from multiemployer bargaining by continuing its activities with the multiemployer association and seeking information about the association’s negotiations with the union to secure the best contract terms for either itself or the association)).

¹³ In light of my ruling that Respondent withdrew from the Association effective May 21, I need not rule on Respondent’s argument that it is not obligated to execute new Association/Union collective-bargaining agreement because the Association and the Union continued negotiations and changed the terms of their agreement after Respondent withdrew from the Association on May 28.

¹⁴ Separate and apart from the unilateral change doctrine, an employer also has a “duty to engage in bargaining regarding any and all mandatory bargaining subjects upon the union’s request to bargain,” unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11–12, 16–17, 20 (2017) (emphasis in original).

regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3–4 (2016).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. The party asserting impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139 (2014), enf'd. 807 F.3d 318 (D.C. Cir. 2015).

If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change: did not alter the status quo (e.g., because the change in question was part of a regular and consistent past pattern); did not involve a mandatory subject of bargaining; was not material, substantial and significant; or did not vary in kind or degree from what has been customary in the past. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20. In addition, the employer may assert that the contractual language privileged it to make the disputed change without further bargaining (the "contract coverage" defense). Under the contract coverage defense, the Board will determine whether the parties' collective-bargaining agreement covers the disputed unilateral change. In making that determination, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation, and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. Since a collective-bargaining agreement establishes principles that govern a myriad of fact patterns, the Board will not require (as a prerequisite to the defense) that the agreement specifically mention, refer to or address the employer decision at issue. If the contract coverage defense is not met, then the Board will determine whether the union waived its right to bargain about a challenged unilateral change. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11–12.

3. Analysis: June 16, 2019 unilateral changes to contributions to Drug Free Workplace program and Target Fund

The facts related to this complaint allegation are not in dispute. In June 2019, Respondent had only recently (in late May) sought to bargain separately with the Union for a successor collective-bargaining agreement. In light of that request, and consistent with Respondent's position that it was not bound by any new agreement between the Association and the Union, Respondent was obligated to maintain the status quo and adhere to the terms of the old collective-bargaining agreement, including making the specified contributions to the Target Fund (\$0.25/hour) and Drug Free Workplace program (\$0.03/hour). (FOF, Sec. II(G)(3).)

The Union maintained that Respondent was bound by the new Association/Union agreement, which (among other things) reduced the Target Fund contribution to \$0.05/hour and eliminated the Drug Free Workplace program contribution. To hedge against the possibility that the Union might prevail in any litigation about that issue, Respondent unilaterally decided to reduce its Target Fund contributions to \$0.05/ hour (setting aside an additional \$0.20/hour pending litigation), and stop its contributions to the Drug Free Workplace program (setting aside the entire \$0.03/hour amount pending litigation). The Union filed a grievance (in June 2019) to contest this change but did not reschedule after canceling a meeting in July to discuss the grievance. In September 2019, Respondent decided to resume making the \$0.25/hour contribution to the Target Fund through October 31 and promised to send a check for any previously set aside amounts related to that Fund. Respondent did not, however, resume contributions to the Drug Free Workplace program and advised that it did not set aside any contributions for that program. (FOF, Secs. II(G)(3), (H), (I)(3), (J)(2).)

Based on the evidentiary record, I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the contributions it was making to the Target Fund and Drug Free Workplace program. Respondent presented these changes to the Union as a fait accompli just over 2 weeks after Respondent sent its first proposal to the Union (on May 30) to begin bargaining for a separate collective-bargaining agreement. The Union, to be sure, maintained at the time that Respondent was bound by the new Association/Union agreement, but it was far too soon for Respondent to take matters into its own hands and change terms and conditions of employment. While Respondent's desire to hedge against two competing outcomes (maintaining the status quo or adhering to the terms of the new Association/Union agreement) is understandable, Respondent's legal obligation as of June 16 was to maintain the status quo until it could negotiate a different arrangement for the fund contributions with the Union. By taking matters into its own hands regarding the Target Fund and Drug Free Workplace program contributions barely after the start of any potential (separate) bargaining, and in the absence of any applicable defenses, Respondent ran afoul of the Act.¹⁵ Compare, e.g.,

¹⁵ Respondent does not argue that it (partially) repudiated this violation by offering to pay the full contribution amounts for the Target Fund through October 31, 2019. See *ExxonMobil Research & Engineering Co., Inc.*, 370 NLRB No. 23, slip op. at 6 & fn. 17 (2020) (dis-

M & M Contractors, 262 NLRB 1472, 1472 (1982) (employer lawfully implemented unilateral changes after the union avoided bargaining for a period of 7 months); *AAA Motor Lines, Inc.*, 215 NLRB 793, 793–794 (1974) (same, after a period of approximately 2.5 months); see also *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994) (explaining that the employer did not satisfy its duty to provide timely notice and a meaningful opportunity to bargain over health plan changes because the employer presented the changes to the union as a fait accompli).

4. Analysis: November 1, 2019 unilateral changes to wages, health care program and pension fund

There is no dispute that Respondent, on November 1, unilaterally implemented its September 13, 2019 contract proposal, and thereby changed bargaining unit employees' wage rates, withdrew from the Southern Ohio Painters Health and Welfare Fund, and ceased participating in the IUPAT Union and Industry National Pension Fund. (FOF, Sec. II(J)(3); see also FOF, Sec. II(I)(1)–(2).) Respondent maintains that it was permissible to take this unilateral action because the parties reached a good-faith impasse in contract negotiations. (See R. Posttrial Br. at 19–20.) The General Counsel, on the other hand, maintains that there could not have been a good-faith impasse because Respondent engaged in bad faith bargaining that improperly led to any impasse. (See GC Posttrial Br. at 22–24.)

I agree with Respondent that it and the Union were at a good-faith impasse when Respondent unilaterally implemented the terms of its contract proposal on November 1 and thereby changed bargaining unit employees' wages, health care and pension. After withdrawing from the Association, on May 28 Respondent requested separate bargaining with the Union. Respondent sent the Union its contract proposal on May 30, and reiterated its request to bargain on May 30, July 1, and September 13. The Union declined each of Respondent's requests, instead asserting that Respondent was bound by the new Association/Union contract. (FOF, Sec. II(E), (H), (I)(1)–(2).) When Respondent declared impasse on September 19 (3.5 months after its initial bargaining request), Respondent was justified in believing that it would be futile to continue requesting bargaining for a separate contract because the Union was locked in to its view that separate bargaining was not appropriate because Respondent was bound by the Association/Union contract.¹⁶ See *M & M Contractors*, 262 NLRB at 1472 (employer lawfully implemented unilateral changes after the union avoided bargaining for a period of 7 months); *AAA Motor Lines, Inc.*, 215 NLRB at 793–794 (same, after a period of ap-

proximately 2.5 months).

cussing the Board's standard for finding that an employer has repudiated unlawful conduct, as set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978).) Accordingly, any such repudiation argument is waived.

¹⁶ Notably, the Union remained locked into its position after September 19, as it contended that Respondent should maintain the status quo while the parties litigated their dispute. At no point between September 19 and November 1 did the Union express any interest in bargaining with Respondent for a separate contract (unless litigation established that Respondent was not bound by the new Association/Union contract). (FOF, Sec. II(I)(4)–(5), (J)(2).)

proximately 2.5 months).

I am not persuaded by the General Counsel's argument that Respondent engaged in bad faith bargaining that led to the impasse. The Board has explained that an employer's regressive proposals violate the Act when they are made in bad faith or are intended to frustrate agreement. "To determine whether regressive proposals are unlawful, the Board considers the totality of an employer's conduct and the circumstances, including factors such as the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. . . . The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion that they were proffered in bad faith." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018) (internal quotation marks and citations omitted).

Here, the General Counsel contends that Respondent's contract proposal was unlawfully regressive and made in bad faith based on how the proposal compares to TA 2 and TA 3. As a preliminary matter, it is important to remember that union membership did not ratify TA 2 and that (as I have found) Respondent's withdrawal from the Association was effective before the Union and the Association agreed on TA 3. But, even if we use those two documents for comparison, I do not find that Respondent's contract proposal was unlawfully regressive. On wages, Respondent offered to increase the wages of several job classifications in exchange for ending contributions to various fringe benefit funds. On pension, Respondent expressed a desire to stop participating in the pension fund and instead provide a 401(k) program if feasible after paying any penalties for withdrawing from the pension fund. And on healthcare, Respondent offered to continue participating in the Southern Ohio Painters Health and Welfare Fund if the Union wished, but in the alternative offered to provide employees with the same health care plan that Respondent provided to employees who were not in the bargaining unit. (See FOF, Sec. II(I)(1).) Thus, while Respondent certainly proposed terms that differed from TA 2 and TA 3, it is debatable whether Respondent's proposal was more or less favorable to union members than TA 2 or TA 3, and regardless Respondent made it clear that it was willing to negotiate with the Union at the bargaining table over these or any other contract terms. The Union, of course, chose not to bargain because it believed that Respondent was bound by the new Association/Union contract. By taking that approach, the Union created the impasse.¹⁷ See *Reliable Tool Co.*, 268

¹⁷ Contrary to the General Counsel, I do not find that Respondent's withdrawal from the Association supports an argument that Respondent was bargaining in bad faith. As I have found, the old collective-bargaining agreement permitted Respondent to withdraw from the Association notwithstanding the ongoing negotiations between the Association and the Union. To the extent that Respondent attended one bargaining session after its withdrawal was effective, I find that Respondent did so based on its incorrect belief that its withdrawal would not take effect until the Association executed another contract extension, and not based on any intent to frustrate its forthcoming negotia-

NLRB 101, 101–102 (1983) (declining to find bad faith bargaining where the employer made new contract proposals that did not suggest an intent to avoid reaching an agreement and the union stopped negotiations to litigate whether the employer’s bargaining conduct was lawful).

In sum, I find that the parties were at a good-faith impasse when Respondent, on November 1, unilaterally implemented the terms of its September 13 contract proposal and thereby changed bargaining unit employees’ wage rates, withdrew from the Southern Ohio Painters Health and Welfare Fund, and ceased participating in the IUPAT Union and Industry National Pension Fund. Since it was lawful for Respondent to unilaterally make those changes due to the good-faith impasse, I recommend that the complaint allegations concerning this conduct be dismissed.¹⁸

D. Did Respondent Violate Section 8(a)(1) of the Act by Making an Unlawful Statement to Bargaining Unit Employees?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, on about October 28, 2019, telling bargaining unit employees that they would need to work for a different employer if they wished to keep their current benefits under a union contract.

2. Applicable legal standards

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer’s conduct or statements violate Section 8(a)(1) of the Act is whether the conduct or statements have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860 (noting that the employer’s subjective motive for its action is irrelevant); *Yoshi’s Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

tions with the Union for a separate contract. (See Discussion and Analysis, Sec. B(3), supra.)

I also note that the General Counsel does not argue that a finding of impasse is precluded because the impasse occurred in the context of serious unremedied unfair labor practices that affect negotiations. See *Royal Motor Sales*, 329 NLRB 760, 762 (1999), *enfd.* 2 Fed. Appx. 1 (D.C. Cir. 2001). Such an argument would fail in any event, as the only unremedied violation here would be Respondent’s unlawful unilateral changes (in June 2019) to its contributions to the Target Fund and the Drug Free Workplace program, and there is no evidence that those changes affected bargaining. To the contrary, the Union did not bargain with Respondent for a separate contract because the Union chose to focus exclusively on litigating whether Respondent was bound by the new Association/Union contract.

¹⁸ I decline Respondent’s request that I find that the Union violated Section 8(b)(3) of the Act by refusing to bargain with Respondent for a separate collective-bargaining agreement. (See R. Posttrial Br. at 21–22.) This issue was not presented in the complaint before me in this case and was not fully litigated.

3. Analysis

The evidentiary record establishes that in an October 28 meeting with employees, employee David Henn and Respondent’s Chief Financial Officer Jack Varney, Jr. had the following exchange:

Henn: So let me get this straight, these are my two options? I either have to take what you’re offering me, even though you don’t have anything solid put together, I have to take what you have to offer or find another [union] contractor to work for after Friday . . . if I want to keep my benefits[?]

Varney: Yes.

(FOF, Sec. II(J)(1).)

The General Counsel maintains that Varney’s response to Henn violated Section 8(a)(1) of the Act, but I cannot find that Varney’s statement had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights and therefore find no violation. Varney’s statement to Henn was accurate given where contract negotiations stood between the Union and Respondent. The parties were at impasse, and Respondent planned to (lawfully) implement its contract proposal on November 1. Thus, Henn and other bargaining unit employees did face the choice that Respondent acknowledged—continue working for Respondent under the soon to be imposed employment terms, or find work with another contractor that signed on to the new Association/Union contract and (generally speaking) keep their benefits.¹⁹ Since Varney accurately acknowledged where things stood, his statement is an opinion that protected by Section 8(c) of the Act. Accordingly, I recommend that this complaint allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and its constituent Locals No. 123 and 238 are a labor organization within the meaning of Section 2(5) of the Act.

3. By, on about June 16, 2019, unilaterally changing contributions to the Target Fund and the Drug Free Workplace program before bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices stated in conclusion of law 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the

¹⁹ Employees would not keep their exact same benefits because the employment terms they had under the status quo (up to October 31, 2019) would differ somewhat from the employment terms they would have if they went to work for a contractor who signed on to the new Association/Union contract.

policies of the Act.

Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decisions to change contributions to the Target Fund and Drug Free Workplace program between about June 16 through October 31, 2019.²⁰ Backpay for these violations shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 *fn.* 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, *supra*. I further recommend that Respondent be ordered to make all contributions to the Target Fund and the Drug Free Workplace program that Respondent would have made between about June 16 through October 31, 2019, but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016) and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 9: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

Respondent, The Painting Contractor, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to make contributions to the Target Fund and the Drug Free Workplace program that were payable between about June 16 through October 31, 2019, due to unlawful unilateral changes made on about June 16, 2019, before bargaining to a good-faith impasse.

(b) In any like or related in manner interfering with, re-

straining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees in the bargaining unit whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral decision (on about June 16, 2019) to change its contributions to the Target Fund and the Drug Free Workplace programs, with interest, as provided for in the remedy section of this decision.

(b) Make contributions to the Target Fund and Drug Free Workplace programs that Respondent would have paid from June 16 through October 31, 2019, but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

(c) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, a copy of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be

²⁰ The make whole remedy for this violation is limited to the June 16 through October 31, 2019 time period because Respondent lawfully implemented its contract proposal effective November 1, 2019.

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²² If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 2019.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 26, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to make contributions to the Target Fund and the Drug Free Workplace program that were payable between about June 16 through October 31, 2019, due to unlawful unilateral changes that we made on about June 16, 2019, before bargaining to a good-faith impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employees in the bargaining unit whole for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral decision (on about June 16, 2019) to change our contributions to the Target Fund and the Drug Free Workplace program.

WE WILL make contributions to the Target Fund and Drug Free Workplace program that we would have paid from June 16 through October 31, 2019, but for the unlawful unilateral changes.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

The Administrative Law Judge's decision can be found at <http://www.nlr.gov/case/09-CA-248716> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

